

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

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Case Title: State of New Mexico, ex.rel. v. Paul Henry Graffis

Case Number: 04-01137

Document Information

Description: Order Granting [19-1] Motion To Quash Summons by State of New Mexico, ex.rel. Granting [18-1] Motion To Dismiss Third-Party Complaint by State of New Mexico, ex.rel. Denying [17-1] Motion To Stay Proceedings with Respect to the Third-Party Complaint by State of New Mexico, ex.rel. .

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Submitted By: Ellen Snyder

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re:

Paul Henry Graffis,

No. 7-04-11497 MF

State of New Mexico, ex rel.

Patricia Madrid, Attorney General,

Plaintiff,

v.

Adv. No. 04-1137 M

Paul Henry Graffis,

Defendant and Third-Party Plaintiff,

v.

Christopher Adams and Paul Adams, et al.,

Third Party Defendants.

**ORDER GRANTING MOTION TO DISMISS THIRD-PARTY COMPLAINT, TO QUASH
SUMMONS AND DENYING MOTION TO STAY PROCEEDINGS**

THIS MATTER is before the Court on the Motion to Dismiss Third-Party Complaint (the “Motion to Dismiss”) filed on October 6, 2004 by the State of New Mexico ex rel. Patricia Madrid, Attorney General (“Plaintiff”). The Plaintiff also filed a Motion to Stay Proceedings With Respect to the Third-Party Complaint (the “Motion to Stay Proceedings”).

The Plaintiff filed the Complaint on July 2, 2004 seeking to determine dischargeability of debts against the Debtor, Paul Henry Graffis (the “Defendant”), pursuant to Bankruptcy Code § 523(a)(2)(A) alleging violations by the Defendant of the New Mexico Unfair Practices Act in connection with sales of used vehicles. On September 8, 2004, the Defendant filed a Third-Party Complaint against fifty-two third party defendants (the “Third-Party Defendants”) alleging that the

Third-Party Defendants are the proper parties to assert claims against Defendant and that any debts to the Third-Party Defendants should be declared dischargeable. The Plaintiff argues that the Third-Party Complaint is inappropriate and unnecessary because the Plaintiff is empowered to pursue restitution from the Debtor on behalf of the Third-Party Defendants as citizens and consumers protected under the Unfair Practices Act.¹ See NMSA § 57-12-1 to § 57-12-16; *State of New Mexico v. Gurley Motor Co.*, 105 N.M. 803, 737 P.2d 1180 (Ct. App. 1987) (recognizing power of Attorney General to sue for restitution on behalf of citizens under Unfair Practices Act).

The filing of third-party complaints is governed by Fed. R. Bankr. P. 7014(a), which provides as follows:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

The Defendant filed his original answer on August 11, 2004 and filed his Third-Party Complaint on September 8, 2004, beyond the 10 day deadline in Rule 7014(a). Under Rule 7014(a), the Defendant was required to obtain leave of Court by filing a motion and notice to all parties in this proceeding. The Defendant did not request such leave.

Because the Third-Party Complaint was filed without leave of this Court in violation of Rule 7014(a), the Court will grant the Plaintiff's Motion to Dismiss. The Motion to Stay Proceedings will be

¹ Several of the Third-Party Defendants have joined in the Motion to Dismiss.

denied as moot. The purpose of a third-party complaint or impleader, is to allow claims against parties who may be liable to the defendant for all or part of the claims against the defendant. The allegations in the Complaint indicate that the Third-Party Defendants are, in fact, customers of Defendant's business Mega Auto Super Store, Inc. who have filed complaints with the State Attorney General's office against the Defendant alleging violations of the Unfair Practices Act. Thus, the Third-Party Complaint is an inappropriate use of the procedure outlined in Rule 7014(a). *See Campbell Sixty-Six Express, Inc. v. Empire Bank (In re Campbell Sixty-Six Express, Inc.)*, 94 B.R. 1014, 1016 (Bankr. W.D. Mo. 1988)(key requirement of third party complaint is that third-party defendant is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff, which may include indemnity, subrogation, warranty, and contribution). This is certainly not the case here. *Cf. Boucher v. McCarter (In re McCarter)*, 289 B.R. 759 (Bankr. D. N.M. 2002)(dismissing third party complaint in dischargeability proceeding), citing *Gulf Insurance Group v. Narumanchi (In re Narumanchi)*, 221 B.R. 311, 315 n. 9 (Bankr.D.Conn.1998) (questioning whether a party could ever be secondarily liable to bankruptcy debtor in connection with dischargeability proceeding because dischargeability actions are declaratory in nature).

WHEREFORE IT IS HEREBY ORDERED that the Third-Party Complaint is dismissed.

IT IS FURTHER ORDERED that the Motion to Stay Proceedings is denied as moot.



MARK B. MCFEELEY
UNITED STATES BANKRUPTCY JUDGE

I certify that on the date shown on the attached document verification, a true and correct copy of

the foregoing was either electronically transmitted, faxed, delivered or mailed to the listed counsel and/or parties.

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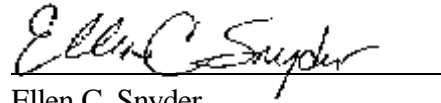
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A handwritten signature in cursive script, reading "Ellen C. Snyder", is written over a horizontal line.

Ellen C. Snyder
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